Office - Supreme Court, U. S.
FILED
JAN 16 1943
CHARLES ELMORE CROPLEY
CLERK

Nos. 655 - 656

Supreme Court of the United States

BERTHA B. FOSTER ET AL., PETITIONERS,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

HENRY C. BUESCHER ET AL., PETITIONERS,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT OF PETITIONERS, BERTHA B. FOSTER ET AL., AND HENRY C. BUESCHER ET AL.,

DON K. WALTER,
Burlington, Iowa,
J. C. PRYOR,
Burlington, Iowa,
JOHN HALE,
Burlington, Iowa,
Attorneys for Petitioners.

Service of the within petition is accepted and receipt of copies acknowledged this.....day of....., 1943.

.....,
Solicitor-General of the United States.

Receipt of copies of the within Brief and Argument is acknowledged this.....day of....., 1943.

.....,
Solicitor-General of the United States.

INDEX

Petition for Review on Writ of Certiorari

I. Statement of the Matter Involved 1

II. Basis for Jurisdiction 3

III. The Questions Presented 3

IV. Reasons Relied On for the Allowance of the Writs 5

Brief and Argument

Reference to Report of Opinion 9

Grounds of Jurisdiction 9

Statement of the Case 11

Specification of Errors 15

Argument—

I. The declarations of taking were admissible 16

II. Cross examination as to prices paid by the condemnor is permissible in order to test the qualifications of an expert witness 20

III. Testimony as to added value of lands for manufacturing purposes was admissible 32

Case Citations

Beery vs. Glynn, 214 Iowa 635, 243 N. W. 365 ..... 5, 20

Crawford vs. Wolf, 29 Iowa 567 ..... 26, 27

Erie Railroad Co. vs. Tompkins, 304 U. S. 64, 82 L. Ed. 1188 ..... 20, 29

Hubbell vs. Des Moines, 166 Iowa 581, 147 N. W. 908 22

Maxwell vs. Iowa Highway Commission, 223 Iowa 159, 271 N. W. 883 22

34637

Olson vs. U. S., 292 U. S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 32
Prescott vs. Merrick, 46 N. D. 67, 179 N. W. 693 27
Ramming Real Estate Company vs. United States, 122 F. 2d 892 18
Simons vs. Ry. Co., 128 Iowa 139, 103 N. W. 129 24
United States vs. Chandler-Dunbar Water Power Co., 229 U. S. 53, 57 L. Ed. 1063 33
United States vs. Miller (not yet reported—decided Jan. 5, 1943) 27, 28
United States ex rel. vs. Reynolds, 115 F. 2d 294 24
Washington Home for Incurables vs. Hazen, 63 App. D. C. 185, 70 F. 2d 847 29
Watkins vs. Wabash R. R. Co., 137 Iowa 441, 113 N. W. 924 21
Westbrook vs. M. N. & S. Ry. Co., 115 Iowa 106, 88 N. W. 202 27

MISCELLANEOUS AUTHORITIES

Jones: Evidence (4th Ed.), Vol. I, p. 294, Sec. 168 17
Lewis: Eminent Domain (2nd Ed.), Sec. 447 29
Title 40, U. S. C. A., Sec. 258 (a) 1, 2, 4, 5, 9, 15, 16
U. S. Compiled Statutes, Sec. 1217 3
28 U. S. C. A., Sec. 347 3
Webster: New International Dictionary (2nd Ed., 1940), p. 875 17

Supreme Court of the United States

BERTHA B. FOSTER ET AL., PETITIONERS,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

HENRY C. BUESCHER ET AL., PETITIONERS,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

I.

STATEMENT OF THE MATTER INVOLVED.

This Petition arises out of condemnation proceedings instituted by the United States under authority of Sec. 258a, Title 40, U. S. Code, for the acquisition of a site for the Iowa Ordnance Plant near Burlington, Iowa, which required an area of some twenty thousand acres. The government acquired all of the lands by purchase except for the Foster farm of 235 acres which was taken in its entirety and the Buescher farm of 172.52 acres of which 132.52 acres were taken. Since these cases were the only condemnation cases resulting from the acquisition, the District Court on its own Motion consolidated them for trial.

During the trial, the government counsel, over objection, repeatedly cross-examined the land owners' witnesses as to prices paid for lands not involved in the pro-

ceedings, and counsel for the land owners cross-examined the government's experts as to prices paid by the government for lands which it acquired by purchase. The Record is entirely barren of any evidence as to whether any of the sales as to which inquiry was made by either side were voluntary or otherwise.

With respect to the Foster farm, but not the Buescher farm, counsel for petitioners also inquired on direct examination of two expert witnesses as to the highest value which they would place upon the land for any reasonable use, either for farming purposes or otherwise. The trial court admitted this testimony but instructed the jury that it could not consider any particular or special value to the government arising from its special need of the property as a site for a shell loading plant. This point was called to the attention of the Circuit Court of Appeals but was either overlooked or ignored by it so far as is disclosed by the opinion.

Counsel for petitioners also offered in evidence the declaration of taking signed by the Secretary of War. The offer was made on the theory that it constituted an admission as to the Secretary's estimate of the value of the farm. (In this connection it should be noted that the statute, Sec. 258a, Title 40, U. S. Code, required "a statement of the sum of money *estimated* by said acquiring authority to be just compensation for the lands taken." The declaration of taking, however, went farther than the statutory requirement in that the Secretary of War therein stated that the sum had been *ascertained* by him to be just compensation.)

The jury returned a valuation of $42,000 for the Foster farm and $31,250 for the Buescher farm.

Thereafter, the government perfected an appeal to the Circuit Court of Appeals for the Eighth Circuit. That Court reversed the District Court and ordered the cases remanded for new trial. Reversal was ordered on the grounds:

1. That the declaration of taking was inadmissible in evidence.

2. That the trial court erred in admitting testimony as to the value of the land for purposes other than farming because the showing as to probability of such other uses was insufficient. (In this connection petitioners point out that, in their opinion, the sufficiency of the evidence as to reasonable probability of other uses should have been held to be a jury question inasmuch as there was testimony that the lands were reasonably adaptable for manufacturing purposes.)

3. That the trial court erred in permitting cross-examination of the government witnesses as to prices paid by the government for other lands in the area. (The Court so held in spite of the fact that there was absolutely no showing that such sales were not entirely voluntary. Tne court also held that the government could cross-examine petitioners' witnesses as to prices paid for other lands in spite of the definitely established rule of the Iowa Supreme Court that testimony as to values of other lands may be shown only upon cross-examination *for the purpose of testing the qualifications of the witness and not as evidence of value.*)

II.

BASIS FOR JURISDICTION.

Authority for the jurisdiction of this court appears in U. S. Compiled Statutes, Sec. 1217; 28 U. S. C. A., Sec. 347.

III.

THE QUESTIONS PRESENTED.

The questions presented constitute the reasons relied upon by petitioners for reversal and are as follows:

1. The Circuit Court erred in holding that the declarations of taking signed by the Secretary of War pursuant to Sec. 258a, Title 40, U. S. Code, were inadmissible as admissions against interest. This is particularly true because of the fact that the Secretary of War stated that he had "ascertained" the amount of just compensation, rather than "estimating" it as required by statute, and because of the further fact that under the law of Iowa any material admission contained in the pleading of a party may be introduced into evidence by the adverse party.

2. The Circuit Court erred in holding that petitioner should not have been permitted to cross-examine the government's expert witnesses with respect to purchases of real estate made by the government in the immediate vicinity of the real estate in question and at approximately the same time as the acquisition thereof by the government where such interrogation was offered and admitted solely for the purpose of testing the qualifications of such witnesses and not as direct evidence of value and where there was no evidence that such purchases were not voluntarily made and where the government had previously been permitted to cross-examine the petitioners' witnesses as to prices paid in sales of other real estate which examination was assertedly for the purpose of testing the qualifications of the petitioners' witnesses.

3. The Circuit Court erred in holding it to be reversible error to admit the testimony of witnesses as to increased value of the Foster farm by reason of its natural adaptability for manufacturing or industrial purposes, particularly in view of the trial court's instructions to the jury that the special value of the farm to the government for ordnance plant purposes could not be considered by them.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

1. The Circuit Court, in its opinion, decided an important question of Federal Law which has not been, but should be, decided by this Honorable Court, to-wit: That a declaration of taking signed by the Secretary of War pursuant to the provisions of Sec. 258a, Title 40, U. S. Code, is inadmissible in evidence as an estimate of a party in interest as to value of land involved in condemnation proceedings by the government.

(This question is of vital importance during the present emergency when the government of necessity is commencing a great number of condemnation proceedings. In order to expedite such cases, it is essential that government agencies, property owners, and the trial court know the correct method of procedure.)

2. The Circuit Court of Appeals for the Eighth Circuit decided an important question of local (Iowa) law in a way which is undoubtedly in conflict with applicable local decisions, to-wit: It held directly in conflict with numerous decisions of the Supreme Court of Iowa that an admission contained in the pleadings, namely; the estimated value of the real estate in controversy, was inadmissible in evidence. (Notably in the case of *Berry* v. *Glynn*, 214 Iowa 635, 243 N. W. 365, the Supreme Court of Iowa held that where a party made a material admission in a pleading and thereafter amended that pleading by striking out the admission the adverse party, nevertheless, could introduce the original pleadings in evidence as an admission against interest.)

3. The Circuit Court of Appeals in its opinion decided yet another important question of Iowa law in manner probably in conflict with applicable Iowa decisions in holding, as it did in these cases, that cross-examination

of witnesses for the condemnor will not be permitted to cover sales of land to the condemning agency even when such sales are voluntary and even where the sole purpose of such cross-examination is to test the qualifications of the witnesses and even after the government's counsel had been permitted, over objection, to cross-examination petitioners' witnesses as to prices paid for other lands.

4. The Circuit Court of Appeals in its opinion in these cases decided still another important question of Iowa law in a manner probably in conflict with Iowa decisions when it held that the doctrine of induced error has no application to the cases at bar, thereby permitting to the government counsel a latitude of cross-examination far greater than that permitted to petitioner.

5. The Circuit Court of Appeals in its opinion decided an important question of Federal Law in conflict with the decisions of other Circuit Courts of Appeals in holding that the prices voluntarily paid by the government for similar lands in the vicinity at about the time of the condemnation could not be shown in evidence as bearing upon the fair market value of the land in controversy or inquired into on cross-examination in order to test the qualifications of the witnesses.

6. The Circuit Court of Appeals in its opinion decided an important question of Federal law in a manner in conflict with previous decisions of this Honorable Court and probably in conflict with the Supreme Court of Iowa with respect to the law of that state when it held, as it did in these cases, that where it had already been shown that the Foster land was readily accessible to improved highways, railways, waterways and the airport, and where it had already been shown that the land was in fact taken for the purpose of establishing a manufacturing plant, that, nevertheless, it was error to permit witnesses for the Fosters to testify as to any increased value of the Foster farm because of its peculiar adaptability as a manu-

facturing site. This holding was not only erroneous, but wholly unnecessary, because of the fact that the trial court clearly instructed the jury that the specific use for which the government acquired the land could not be considered in determining the question of value and that the jury likewise might not consider any additional value occasioned by the particular and special use of the property as a site for a shell loading plant. The jury, therefore, cannot have been misled to the government's prejudice. The fact that they were not misled is indicated by the fact that their award was very substantially less than the lowest valuation placed on the Foster farm by any of the witnesses for petitioner. The Circuit Court of Appeals, therefore, departed from the accepted and usual course of judicial proceeding to such an extent as to call for an exercise of the powers of supervision of this Honorable Court.

Wherefore, your petitioners pray this Honorable Court to require by writs of certiorari that these causes be certified to the Supreme Court for determination by it as provided by statute.

DON K. WALTER,
Burlington, Iowa,
J. C. PRYOR,
Burlington, Iowa,
JOHN HALE,
Burlington, Iowa,
Attorneys for Petitioners.